STATE OF MICHIGAN
IN THE SUPREME COURT

CITIZENS PROTECTING MICHIGAN'S CONSTITUTION, JOSEPH SPYKE, and **JEANNE DAUNT**,
Plaintiffs – Appellants,

v

SECRETARY OF STATE and **MICHIGAN BOARD OF STATE CANVASSERS**,
Defendants / Cross-Defendants – Appellees,

and

VOTERS NOT POLITICIANS BALLOT COMMITTEE, d/b/a **VOTERS NOT POLITICIANS, COUNT MI VOTE**, a Michigan Non-Profit Corporation, d/b/a **VOTERS NOT POLITICIANS, KATHRYN A. FAHEY, WILLIAM R. BOBIER** and **DAVIA C. DOWNEY**,
Intervening Defendants / Cross-Plaintiffs – Appellees

Supreme Court
No. 157925

Court of Appeals
No. 343517

INTERVENING DEFENDANTS / CROSS-PLAINTIFFS – APPELLEES' ANSWER IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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INTERVENING DEFENDANTS / CROSS-PLAINTIFFS – APPELLEES' ANSWER IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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The Plaintiffs – Appellants contend the answer should be "No."

The Intervening Defendants/Cross-Plaintiffs – Appellees contend the answer is "Yes."

II. IS EXCLUSION OF THE PROPOSAL AT ISSUE FROM THE BALLOT REQUIRED IF THE COURT SHOULD DETERMINE THAT ONE OR MORE OF THE ALLEGED VIOLATIONS OF MCL 168.482(3) HAS BEEN ESTABLISHED?

The Court of Appeals did not address this question.

The Plaintiffs – Appellants contend the answer should be "Yes."

The Intervening Defendants/Cross-Plaintiffs – Appellees contend the answer is "No."

III. IS THE STATUTORY REPUBLICATION REQUIREMENT OF MCL 168.482(3) UNCONSTITUTIONAL?

The Court of Appeals did not address this question.

The Plaintiffs – Appellants have contended that the answer should be "No."

The Intervening Defendants/Cross-Plaintiffs – Appellees contend the answer is "Yes."

IV. WOULD EXCLUSION OF THE PROPOSAL AT ISSUE FROM THE BALLOT FOR THE ALLEGED VIOLATION OF MCL 168.482(3) BE UNCONSTITUTIONAL, AS AN IMPERMISSIBLE CURTAILMENT OR BURDENING OF THE PEOPLE'S RESERVED RIGHT TO PROPOSE AMENDMENT OF THE CONSTITUTION BY VOTER INITIATIVE, WHEN ANOTHER SUFFICIENT BUT LESS RESTRICTIVE REMEDY IS AVAILABLE?

The Court of Appeals has not addressed this question.

The Plaintiffs – Appellants have contended that the answer should be "No."

The Intervening Defendants/Cross-Plaintiffs – Appellees contend the answer is "Yes."

V. HAS THE BALLOT PROPOSAL AT ISSUE BEEN PROPERLY PRESENTED AS A VOTER-INITIATED PROPOSAL FOR AMENDMENT OF THE CONSTITUTION PURSUANT TO CONST 1963, ART 12, § 2?

The Court of Appeals has answered this question "Yes."

The Plaintiffs – Appellants contend the answer should be "No."

The Intervening Defendants/ Cross-Plaintiffs contend the answer is "Yes."

INTRODUCTION

The ballot proposal sponsored by Intervening Defendant Voters Not Politicians ("VNP") was born of a powerful frustration arising from a long and widely-held belief that vast numbers of our citizens have been denied fair representation in the state legislature and the U.S. Congress by the current system of redistricting, which allows the dominant political party to seize and perpetuate an unfair advantage by diminishing the value of votes cast by members of the opposing party.

The Plaintiffs – Appellants are individuals and a ballot question committee formed by people who are opposed to the substance of that proposal for the reasons stated at length in their Application for Leave to Appeal. Under our system of laws, the Plaintiffs are absolutely entitled to hold and express their opinions, and to advocate that they should be adopted by others. But by their present request for a writ of mandamus, Plaintiffs have ventured a step too far, revealing their apparent belief that opposing viewpoints of others should not be valued as highly as their own, and suggesting that the people of Michigan should therefore be denied the opportunity to exercise their constitutionally-reserved right to vote for or against the proposal at issue. Our Court of Appeals has properly declined Plaintiffs' invitation to deny the people that fundamental right, and thus, the Plaintiffs have renewed their plea before this Court.

VNP prays that this Court will decline that invitation as well. For all of the reasons discussed in greater detail *infra,* VNP contends that the Court of Appeals has properly rejected the claims now presented in Plaintiffs' Application for Leave to Appeal, that further review of those claims by this Court is therefore unnecessary, and that Plaintiffs' Application should therefore be denied.

The Court of Appeals carefully reviewed Plaintiffs' contrived claims of abrogation and correctly determined that VNP's proposal would not abrogate any of the existing constitutional provisions identified in Plaintiffs' filings. It also correctly determined that VNP's proposal was appropriately presented as a proposed amendment of the Constitution pursuant to Const 1963, art 12, § 2. The Court of Appeals reached the correct result based upon sound legal reasoning, and has appropriately directed the Secretary of State and the Board of State Canvassers to take all necessary steps to place VNP's proposal on this year's general election ballot.[1] This being the case, there is no basis for any finding that the Court of Appeals' Judgment was erroneous, much less an abuse of its judicial discretion. The interests of justice would therefore be best served by a denial of leave to appeal.

If this Court should find that additional review of this matter is warranted and ultimately conclude that VNP's petition would abrogate one or more of the specified constitutional provisions if adopted, there will be other important questions for the Court to resolve. It will be necessary, in that event, to consider whether the alleged violation of MCL 168.482(3) requires the exclusion of VNP's proposal from the ballot, as Plaintiffs have suggested, or whether the violation could be more appropriately remedied by a directive to Defendant Secretary of State to include the omitted provision or provisions when discharging her constitutionally-required duty to publish other provisions which would be abrogated by the amendment if approved.

If the Court should find that exclusion of VNP's proposal from the ballot would be the necessary remedy for a violation of § 482(3) , it will be necessary for the Court to consider

[1] The Board of Canvassers certified VNP's proposal for submission on the ballot in compliance with the Court of Appeals' Judgment during its meeting of June 20, 2018.

important questions of first impression concerning the constitutionality of that provision – specifically, whether its republication requirement can be sustained as a proper regulation of petition "form" within the scope of the Legislature's limited authority to implement the self-executing provisions of Const 1963, art 12, § 2, and if so, whether enforcement of that provision by exclusion of VNP's proposal from the ballot would be unconstitutional, as an unnecessary and undue curtailment or burdening of Intervening Defendants' constitutional right to propose amendment of the Constitution by voter initiative.

And if the Court should find it necessary to consider Plaintiffs' exaggerated claim that VNP's petition has proposed a "general revision" of the Constitution which can only be accomplished by means of a constitutional convention, the Court should also consider whether it should adopt the arbitrary and unreliable quantitative/qualitative test adopted in *Citizens Protecting Michigan's Constitution v Secretary of State,* 280 Mich App 273; 761 NW2d 210 (2008), *result affirmed,* 482 Mich 960; 755 NW2d 157 (2008).

These questions have been preserved and discussed in the proceedings below, but the Court of Appeals did not address all of them, having concluded, it may be assumed, that the questions left unanswered were questions more appropriately reserved for this Court. The Intervening Defendants are confident that if further review is found to be necessary, the correct resolution of these important questions should leave the final conclusion and result unchanged – that the people's constitutionally-guaranteed right to vote for or against VNP's proposal must be respected and facilitated.

COUNTER-STATEMENT OF FACTS

Plaintiffs' "Concise Statement of Material Proceedings and Facts" is improperly argumentative, especially with respect to the content of VNP's proposal, which of course speaks

for itself. Intervening Defendants cannot improve upon the very detailed and objective summary of the pertinent facts, including the summaries of VNP's proposal and the existing constitutional provisions, provided in the Court of Appeals' Opinion, so they will not burden the Court with an attempt to do so. Discussion of the pertinent facts will instead be included in the body of the Legal Arguments, *infra*, to the extent that such discussion may be required to fully inform the Court.

LEGAL ARGUMENTS

I. THE STANDARDS OF REVIEW.

The standards for adjudication of a request for mandamus have been accurately summarized in the Court of Appeals' Opinion, and the Plaintiffs have correctly acknowledged that a court's decision to grant or deny a writ of mandamus is reviewed for abuse of discretion. *Stand up for Democracy v Secretary of State,* 492 Mich 588, 598; 822 NW2d 159 (2012). Questions of law addressed in relation to a grant or denial of mandamus, including questions of constitutional and statutory construction, are reviewed *de novo. Studier v Michigan Public School Employee Retirement Board,* 472 Mich 642, 649; 698 NW2d 350 (2005); *Citizens for Protection of Marriage v Board of State Canvassers*, 263 Mich App 487, 491-492; 688 NW2d 538 (2004).

II. THE RULES OF CONSTITUTIONAL CONSTRUCTION.

It is well settled that the primary objective in interpreting a constitutional provision is to determine the "common understanding" of the people – "the text's original meaning to the ratifiers, the people, at the time of ratification." *Studier v Michigan Public School Employees' Retirement Board, supra,* 472 Mich at 652. Courts typically discern the common understanding of constitutional text by applying each term's plain meaning at the time of ratification, but if the constitution employs technical or legal terms of art, those terms are construed in their

technical, legal sense. *Id.* To determine the meaning of constitutional language, it is also appropriate to consult dictionary definitions. *Citizens Protecting Michigan's Constitution v Secretary of State,* 280 Mich App 273, 295; 761 NW2d 210 (2008), *affirmed as to result,* 482 Mich 960 (2008).

The decisions have recognized two additional rules of construction relevant to the questions presented in this matter – that judicial interpretations of prior constitutional provisions and the meaning of specific terms intended by the drafters are also relevant to interpretation of constitutional language. In *Boards of County Road Commissioners v Board of State Canvassers,* 391 Mich 666; 218 NW2d 144 (1974), this Court noted that:

> "Where a constitutional provision has received a settled judicial construction, and is afterwards incorporated into a new or revised constitution, or amendment, it will be presumed to have been retained with a knowledge of the previous construction, and courts will feel bound to adhere to it." 391 Mich at 675.

And in *Beach Grove Investment Company v Civil Rights Commission,* 380 Mich 405; 157 NW2d 213 (1968), the Court explained the difference between "prescribed by law" and "provided by law" as used in the 1963 Constitution by reference to the drafters' explanation:

> " . . . The Committee on Style and Drafting of the Constitutional Convention of 1961 made a distinction in the use of the words "prescribed by law" and the words "provided by law." Where "provided by law" is used, it is intended that the legislature shall do the entire job of implementation. Where only the details were left to the legislature and not the over-all planning, the Committee used the words "prescribed by law." See Official Record, Constitutional Convention of 1961, pp 2673, 2674." 380 Mich at 418-419.

III. THE COURT OF APPEALS PROPERLY FOUND THAT THE PROPOSED CONSTITUTIONAL AMENDMENT AT ISSUE WOULD NOT ABROGATE ANY EXISTING CONSTITUTIONAL PROVISIONS.

Plaintiffs' effort to exclude VNP's proposal from the ballot has been based, in large part, upon their claim that the petition failed to comply with MCL 168.482(3), which provides, in pertinent part, that:

> "If the proposal would alter or abrogate an existing provision of the constitution, the petition shall so state and the provisions to be altered or abrogated shall be inserted, preceded by the words: 'Provisions of existing constitution altered or abrogated by the proposal if adopted.'"

The Court of Appeals has appropriately concluded that this claim is "without merit."

A. THE STATUTORY REPUBLICATION REQUIREMENT.

This Court has examined this statutory requirement, often referred to as the "republication requirement" of § 482(3), and in both *Ferency v Secretary of State*, 409 Mich 569; 297 NW2d 544 (1980), and *Protect Our Jobs v Board of State Canvassers,* 492 Mich 763, 772; 822 NW2d 534 (2012), has ruled that it should not be necessary for the sponsor of a petition proposing a constitutional amendment to obtain a judicial determination prior to circulating its petition that it has correctly identified and republished all sections of the Constitution that would be abrogated by the proposal. In *Ferency*, this Court appropriately characterized the republication requirement as "a new requirement regarding substantive content," but assumed for the sake of its discussion that it was a "regulation of form," while cautioning that the burden imposed by that requirement cannot unduly restrict the people's free exercise of their constitutionally guaranteed right to seek amendment of the constitution by initiative petition:

> "***Assuming arguendo that a new requirement regarding substantive content is a regulation of form***, and assuming that the legislature can impose minimal burdens to keep the process fair, open and informed, the burden imposed cannot unduly restrict the exercise of the right." 409 Mich at 593 (Emphasis added)

The *Ferency* Court also properly recognized that the language of Const 1963, art 12, § 2 does not require that a petition specify the existing provisions that would be altered or abrogated by the proposed amendment beyond its directive that the petition "shall be in the form . . . as prescribed by law."[2] This Court also appropriately recognized that the constitutional language imposes that obligation upon the state alone, while the obligation is imposed upon petitioners indirectly by MCL 168.482(3). 409 Mich 592-593. After stating these guiding principles and others which will be discussed below in relation to the constitutionality of § 482(3), the *Ferency* Court expressed its conclusion that correctly interpreting the Constitution to identify all provisions affected by a proposed amendment is too onerous a burden to place upon the right of popular amendment, and cannot be justified as a means of educating persons signing petitions:

> "***Correctly interpreting the constitution to identify all provisions affected by a proposed amendment is too onerous a burden to place upon the right of popular amendment. Nor can it be justified as a means of educating persons signing petitions.*** A petitioner faced with the prospect of having his or her entire petition drive nullified by the failure to list a constitutional provision will, out of caution, err on the side of inclusion. Petitions will become a maze of constitutional provisions, if indeed petitioners will not simply attach copies of the entire constitution to their petitions. The provisions expressly being amended may be lost among those less directly affected. Few people will understand, without extensive explanation, how or how much a particular listed provision is being altered." 409 Mich at 595-596 (Emphasis added)

Having expressed these concerns, the *Ferency* Court held that it is only where the proposed amendment would directly "alter or abrogate" specific provisions of the existing

[2] It is important to note, in this regard, that inclusion of this information in petitions proposing constitutional amendments was included as an element of required substantive content in the 1908 Constitution as originally adopted, but this requirement was eliminated by an amendment of Const 1908, art 17, § 2, approved by the voters in 1913. A copy of Const 1963, art 12, § 2 is submitted herewith as Appendix "A." Copies of Const 1908, art 17, § 2 as originally adopted, and as subsequently amended in 1913 and 1941, are submitted herewith as Appendices "B," "C" and "D," respectively.

Constitution that those provisions must be noted in petitions, and explained, consistent with its prior decision in *School District of the City of Pontiac v City of Pontiac,* 262 Mich 338; 247 NW 474 (1933),[3] that an existing constitutional provision is deemed to be abrogated if the proposed amendment would render it wholly inoperative. There is no abrogation if the existing provision will remain operative, although there may be a need thereafter to construe that provision in conjunction with the amending provisions. 409 Mich at 596-597.

Thus, having proceeded based upon its briefly-stated assumption ***arguendo*** that the statutory requirement to list provisions that would be abrogated by the proposed amendment is a matter of petition "form," subject to legislative regulation, the *Ferency* Court appears to have also assumed that the requirement was constitutional to the extent of requiring the petitioner to list provisions that would be "altered or abrogated," as defined in the Court's Opinion. But in so ruling, the Court also expressed its recognition that adoption of a more expansive definition of "alter or abrogate" for this purpose would effectively require a petitioner to secure a judicial determination in advance, and found that this was not intended by the Legislature. 409 Mich at 597-598.

B. THE PROPOSED CONSTITUTIONAL AMENDMENT WOULD NOT ABROGATE EXISTING CONSTITUTIONAL PROVISIONS.

In *Protect Our Jobs*, this Court addressed questions of alleged abrogation in four separate matters, including a proposal to authorize construction of eight new casinos on

[3] In *School District of the City of Pontiac,* which addressed a post-election challenge to the validity of a constitutional amendment adopted in 1932 under the provisions of the 1908 Constitution as amended in 1913, the Court rejected the plaintiff's argument that the amendment should be invalidated because the Secretary of State had failed to properly discharge his constitutional obligation to publish all of the existing constitutional provisions that would be altered or abrogated by the proposed amendment, if adopted. Under the 1908 Constitution, as amended, there was no constitutional requirement for the petition to identify those provisions, and the statutory provision requiring petitions to do so was enacted later.

specified parcels of real property. In deciding those matters, the Court reaffirmed the standards previously set forth in *City of Pontiac* and *Ferency,* and provided additional clarification of the meaning of the constitutional and statutory language. The Court prefaced its discussion by emphasizing that it sought to avoid any construction which would require a petition circulator to secure a judicial determination of which provisions of the existing Constitution a proposed amendment would alter or abrogate, and repeating its previously expressed observation that, "the ordinary elector, not being a constitutional lawyer, would be confused rather than helped by a publication of all the other constitutional provisions which were or might be directly or only remotely, and possibly only contingently, affected by the proposed amendment." 492 Mich at 781.

The Court went on to hold, consistent with its prior decisions, that: 1) the republication requirement is only triggered by a change that would essentially eviscerate an existing provision; 2) an existing provision of the Constitution is abrogated and must therefore be republished if it is rendered "wholly inoperative"; 3) An existing provision is rendered wholly inoperative if the proposed amendment would render it a nullity or if it would be impossible for the amendment to be harmonized with the existing provision; 4) an existing provision is not rendered wholly inoperative if it can be reasonably construed in a manner consistent with the new provision; and 5) there is no abrogation when the existing provision would likely continue to exist as it did, although it might be affected or supplemented in some fashion by the proposed amendment. 492 Mich at 782-783.

As the Court of Appeals Opinion in this case has noted, the Plaintiffs have suggested an unduly narrow and restrictive interpretation of this Court's decision in *Protect Our Jobs* – an interpretation which does not withstand scrutiny when it is seen that the Court's decision in that

case is most significant for its reinforcement of the flexible principles established in its prior decisions. The clarification regarding the republication requirement provided in *Protect Our Jobs* was that an existing constitutional provision that uses nonexclusive or non-absolute language is less likely to be rendered inoperative simply because a proposed new provision introduces in some manner a change to the existing provision; and that an abrogation may be found when a discrete portion of the existing provision, including, in some cases, a single phrase or word, would be rendered "wholly inoperative" and the conflicting provisions cannot be harmonized. 492 Mich at 783-784.

The proposal excluded from the ballot in *Protect Our Jobs* involved an abrogation based upon a single word – the reference to the Liquor Control Commission's ***complete*** control of alcoholic beverage traffic conferred by Const 1963, art 4, § 40. This Court concluded that where the proposed amendment (that would have required that the eight proposed casinos ***shall*** be granted liquor licenses) would have nullified an entire sentence in the Constitution (that had conferred complete control of alcoholic beverage traffic) by eliminating the exclusivity of control, it constituted an abrogation. It was not unreasonable to conclude, in that case, that entirely negating the significance of that single word ***did*** render a portion of the existing provision "wholly inoperative" and a "nullity," allowing no possibility for harmonization of the conflicting provisions. Therefore, it came as no surprise that the Court found an abrogation with respect to that proposal. No such inconsistency can be found with respect to VNP's proposal.

1. THE PROPOSED AMENDMENT WOULD NOT ABROGATE ANY PART OF CONST 1963, ART 9, § 17.

Plaintiffs have alleged that the language of the proposed Const 1963, art 4, § 6 (5) requiring compensation and indemnification of Commissioners would abrogate the directive of Const 1963, art 9, § 17, that, "No money shall be paid out of the state treasury except in

pursuance of appropriations made by law." This claim is without merit, as the proposal does not produce an incompatibility rendering Const 1963, art 9, § 17 a "nullity," as Plaintiffs have erroneously asserted.

The Court of Appeals correctly rejected this argument:

> "In examining the Appropriations Clause from the 1908 Constitution, our Supreme Court recognized that 'the weight of authority' held that the clause did not restrict appropriations to enactments from the Legislature, but also afforded "a constitutional appropriation apart from any action by the legislature." Civil Service Comm v Auditor General, 302 Mich 673, 679; 5 NW2d 536 (1942). But even so, the VNP Proposal accounts for the legislative appropriation, as it provides for a cause of action if the Legislature does not appropriate the funds—thereby indicating that the money is to come from the Legislature via an appropriation." *Slip Op. at p. 26.*

VNP's proposed Const 1963, art 4, § 6 (5) would provide a mandatory constitutional directive that the Legislature appropriate funds sufficient to compensate the Commissioners and to enable the Commission to carry out its functions, operations and activities, and that the appropriation made for these purposes be not less than the amount specified – 25 percent of the General Fund/ General Purpose Budget for the Secretary of State for each fiscal year when the Commission is performing its duties.[4] The provisions of the proposed Const 1963, art 4, § 6, including the duty of the Legislature to appropriate the required funding, would be self-executing.[5] Thus, if the Legislature complies with its constitutional obligation, as the Court

[4] It is noteworthy that the proposed language imposing this obligation is very similar to the existing provision in Const 1963, art 4, § 6: "The legislature shall appropriate funds to enable the commission to carry out its activities." It is also similar to the Legislature's obligation to appropriate funding for operation of the Civil Service Commission included in Const 1963, art 11, § 5. The Court should also note that, although the proposed Const 1963, art 4, § 6 (5) would require funding of the Commission at the minimum level specified, it would also require the Commission to return to the State Treasury all unexpended funds within 6 months after the end of each fiscal year as does Const 1963, art 11, §5.

[5] *See*, Proposed Const 1964, art 4, § 6 (20).

should assume it will, there will never be a need for any payment of additional money from the State Treasury. In the unlikely event that the Legislature should disregard its constitutional obligation to provide the required funding, the Commission would then have standing to enforce this obligation.[6] The Legislature is not free to disregard its constitutionally-prescribed duty to provide necessary funding for the required operations of a constitutionally-established entity. *See, e.g., Adair v Michigan,* 497 Mich 89; 860 NW2d 93 (2014) (addressing enforcement of the Legislature's obligation to appropriate sufficient funding to satisfy its obligation under the Headlee Amendment); *46th Circuit Trial Court v County of Crawford*, 476 Mich 131; 719 NW2d 553 (2006) (addressing enforcement of funding unit's obligation to appropriate funds for trial court operations).[7]

But although the proposed Const 1963, art 4, § 6 (6) would provide a means for seeking enforcement of the Legislature's obligation to appropriate the required funding by judicial action, it does ***not*** include any language stating or implying that a judicial decree to enforce that obligation could require a payment from the State Treasury to satisfy that obligation without an appropriation of the required funds. Similarly, the proposed Const 1963, art 4, § 6 (5) would require the State of Michigan to indemnify the Commissioners for costs incurred if the Legislature does not appropriate sufficient funds to cover such costs in violation of its

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[6] It is anticipated that if enforcement action were required, a request would be made for a declaratory judgment to establish the obligation to provide the required funding and determine the amount required. A writ of mandamus could then be issued to direct the Legislature to appropriate the amount determined pursuant to MCR 2.605(F).

[7] Plaintiffs have cited *Musselman v Governor,* 448 Mich 503; 533 NW2d 237 (1995) as support for their argument that the Legislature cannot be compelled to appropriate money by writ of mandamus. Their reliance upon that decision is misplaced because the provision at issue in that case – Const 1963, art 9, § 24 – did not include any self-executing directive for the Legislature to appropriate money, as VNP's proposal does, and the Court's finding that no relief could be granted in that matter was also based on the fact that there were no previously-appropriated but unencumbered funds from which a judgment could be paid. 448 Mich at 521-524.

constitutionally-prescribed duty to do so. This provision would create a constitutionally-based cause of action for indemnification in favor of the Commissioners. This is no different than any other claim against the state for a money judgment.

The provisions of the proposed amendment and the existing Const 1963, art 9, § 17 can be easily construed and harmonized to mean that a judgment against the Legislature would stand on the same footing as any other money judgment against the state, which cannot be paid unless the Legislature makes a specific appropriation to cover it, or there is previously-appropriated unencumbered funding from which the judgment may be paid, as discussed in MCL 600.6458(2). As the Court of Appeals has correctly noted, it is not necessary to now determine how a judicial decree to enforce payment of the constitutionally-required funding might be enforced against the Legislature in the face of a refusal to comply; the only question is whether VNP's proposed amendment would replace, render wholly inoperative, or eviscerate the appropriations clause. The Court of Appeals has properly determined that it would not.

This Court's decision in *Protect Our Jobs* instructs that evaluation of whether an existing provision would be abrogated by a proposed amendment requires a comparison of the language of the existing provision with the language of the proposed amendment, and a determination as to whether the proposed amendment would render all or a part of the existing provision inoperative, or a "nullity," incapable of being harmonized with the new language. It is therefore appropriate to ask: Where, in the proposed amendment, is the language commanding that the Treasury Department pay money out of the State Treasury without an appropriation? As the Court of Appeals correctly recognized, there is none. Plaintiffs' objection might have had some merit if the proposal included language requiring, for example, that the Treasury make payment upon presentation of a warrant for payment issued by the

Commission's Chairperson or Secretary, but the proposal does not include this or any similar directive. So, there is no inconsistency between the existing and proposed language. Plaintiffs are really suggesting that an abrogation should be found based upon their own ***assumption*** that the constitutional directive to appropriate and indemnify would require the Treasury Department to make payment without any appropriation, but that is not what the proposal says. And in the absence of any such specific directive, there is no basis for finding an abrogation.

2. THE PROPOSED AMENDMENT WOULD NOT ABROGATE ANY PART OF CONST 1963, ART 11, § 1.

Plaintiffs have alleged that the language of the proposed Const 1963, art 4, § 6 (2)(a)(iii) requiring applicants for employment as Commissioners to attest under oath that they meet the specified qualifications for that employment somehow abrogates the language of Const 1963, art 11, § 1, providing that, "No other oath, or any religious test shall be required as a qualification for any office or public trust." As the Court of Appeals correctly concluded, this claim is meritless:

> "Plaintiffs maintain that the existing provision requires only one oath, and the new provision would render the existing provision a nullity. The affirmation in proposed § 6(2)(a)(ii) is not an oath of office, but is merely an affirmation that the applicant satisfies the commissioner qualifications, which are enumerated in a separate section, § 6(1). This position finds support in Advisory Opinion on Constitutionality of 1975 PA 227, 396 Mich 465, 510: 242 NW2d 3 (1976), where our Supreme Court ruled that an oath regarding financial disclosure was akin to the affidavits required to file a nominating petition under MCL 168.558." *Slip Op. at p. 27.*

The Court of Appeals properly cited this Court's decision in *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich 455, 510; 242 NW2d 3 (1976), as support for its finding that, like the required financial disclosures at issue in that case, the affirmation required by VNP's proposal is akin to the affidavit of identity required for filing of a nominating petition under MCL 168.558. It is well established that affirmations of this character do not violate the

constitutional prohibition against requirement of additional oaths or tests for public office. In *Tedrow v McNary*, 270 Mich 322; 258 NW 868 (1935), this Court held that a statutory requirement to file an affidavit establishing qualifications to hold office did not run afoul of the identical "no other oath" provision of Const 1908, art 16, § 2, where the required affidavit did not require any statement in any way affecting the candidate's rights as a citizen, or his religious or political affiliations. 270 Mich at 334-335.

The proposed amendment can also be harmonized with Const 1963, art 11, § 1, because the affirmation required by the proposed Const 1963, art 4, § 6 (2)(iii) does not impose any requirement beyond the requirements established by the proposed Const 1963, art 4, § 6 (1), and thus, it cannot be construed as a pledge that is in any way inconsistent with, or beyond the scope of a prospective Commissioner's duty to uphold the state Constitution and to faithfully discharge the duties of the office, as pledged by the oath of office required under Const 1963, art 11, § 1. This being the case, there is no basis for Plaintiffs' suggestion that the proposed amendment will render any part of Const 1963, art 11, § 1 inoperative, or a "nullity."

In the Court of Appeals, Plaintiffs argued that the affirmation required by VNP's proposal ran afoul of Const 1963, art 11, § 1 because it improperly imposes a political test for employment as a Commissioner – a claim first asserted in their Reply Brief – and they have now renewed that objection in their presentation to this Court. This argument is also meritless.

The essential purpose of Const 1963, art 11, § 1 and the similar provisions of Michigan's prior Constitutions has been to prevent the requirement of any political or religious tests as qualifications for public office. Thus, the "no other oath" provision has been included to prevent attempts to require a pledge of adherence to any political or religious belief or any promise to provide any performance beyond that required by the constitutional oath of office.

It was never intended to preclude application of legitimate qualifications for public employment. *See, Attorney General v The Board of Councilmen of the City of Detroit*, 58 Mich 213, 217-218; 24 NW 887 (1885). Also, decisions of this Court have held that appointment to public bodies may be based, in part, upon consideration of political affiliation in cases where the requirement in question is designed to ensure representation of diverse political interests, and does not exclude persons of any particular political persuasion from participation. *See, e.g., Attorney General ex rel. Connolly v Reading*, 268 Mich 224; 256 NW 432 (1934); *Attorney General ex rel. Fuller v Parsell,* 99 Mich 381; 58 NW 335 (1894).

VNP's proposal does not establish any political test for employment as a Commissioner as Plaintiffs have claimed, nor does it exclude anyone, of any political persuasion, from eligibility for service as such. The purpose of the proposal is to assure that the Commission will be comprised of persons having the desired diversity of political viewpoints, and thus, cannot be dominated by any single political party. To ensure that the Commission will be comprised of persons having the desired diversity of political viewpoints, and thus, cannot be dominated by any single political party, the proposal would require that prospective Commissioners be chosen from three separate pools of candidates, two of which would be made up of persons affiliating with each of the two major political parties, and the third being made up of persons who do not affiliate with either of those parties. Thus, it may be seen that all otherwise qualified persons may apply and be considered for selection to serve as a Commissioner.

VNP's proposal also includes provisions that would exclude certain persons, including current and former political office holders, candidates for elected political office, lobbyists and employees of the Legislature, whose circumstances present a potential for partisan political

influence. Exclusion of those persons cannot be characterized as a political test.[8] It is, instead, an additional measure appropriately designed to ensure that the Commission will be free of partisan political influence, and is therefore squarely within the scope of qualifications which may be required to ensure a balanced representation of political interests.

These provisions, included as legitimate qualifications for employment as Commissioners, do not run afoul of Const 1963, art 11, § 1 or this Court's precedents approving provisions designed to promote desirable political balance.[9] As the Court of Appeals correctly noted in this case:

> "In contrast, the oath in Harrington v Secretary of State, 211 Mich 395, 396; 179 NW2d 283 (1920), cited by plaintiffs, required the candidate to swear in part that he would "support the principles of [the] political party of which he is a member if nominated and elected." That loyalty oath was to cover the entire term of office, even after election, and for so long as he or she remained in office. In ruling that the oath was unconstitutional, the Court cited with approval the Attorney General's reasoning that the candidate would be bound by an oath other than the constitutional oath of office. Id. at 397. The same is not true here, as the oath required by the VNP Proposal relates only to the information on the application and does not bind a candidate once he or she becomes a commissioner." *Slip Op. at p. 27.*

The Court of Appeals correctly decided this issue. This Court does not need to review this conclusion.

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[8] Const 1963, art 4, § 6 currently provides: "No officers or employees of the federal, state or local governments, excepting notaries public and members of the armed forces, shall be eligible for membership on the commission. Members of the commission shall not be eligible for election to the legislature until two years after the apportionment in which they participated becomes effective."

[9] The Court should note, in this regard, that our present Constitution includes similar provisions designed to ensure balanced representation of political interests and freedom from partisan political influence. These may be found in the existing provisions of Const 1963, art 4, § 6, regarding qualifications for, and appointment of members of the Commission on Legislative Apportionment created by that section, and by the language of Const 1963, art 2, § 7, providing that "[a] majority of any board of canvassers shall not be composed of members of the same political party."

3. THE PROPOSED AMENDMENT WOULD NOT ABROGATE ANY PART OF CONST 1963, ART 1, § 5.

Plaintiffs have alleged that the language of the proposed Const 1963, art 4, § 6 (11) restricting the ability of the Commission's members and its staff, attorneys and consultants to discuss redistricting matters with members of the public outside of an open public meeting of the Commission would abrogate the language of Const 1963, art 1, § 5, providing that, "Every person may freely speak, write, express and publish his views on all subjects, being responsible for the abuse of that right." This claim is without merit because the plain language of Const 1963, art 1, § 5 clearly states that the right to speak, write and publish on all subjects guaranteed by that provision is not absolute, as its language specifically provides that every person is responsible for abuse of that right.

Plaintiffs have acknowledged that speech of government employees is subject to regulation by their citation of *Shirvell v Department of Attorney General,* 308 Mich 702; 866 NW2d 478 (2015), which noted that, "while an employee does not forfeit his or her free speech interests by virtue of holding government employment, 'the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general'" and that "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." 308 Mich App at 732-733, quoting *Pickering v Board of Education,* 391 US 563, 568; 88 S Ct 1731; 20 L Ed 2d 811 (1968) and *Garcetti v Ceballos,* 547 US 410, 418; 126 S Ct 1951; 164 L Ed 2d 689 (2006).[10]

[10] The right of private citizens to speak as they choose can also be restricted in some circumstances to serve important public interests. *See, e.g., Grievance Administrator v Fieger,* 476 Mich 231; 719 NW2d 123 (2007).

Const 1963, art 1, § 5 can easily be harmonized with the proposed amendment because the more specific provision of the proposed Const 1963, art 4, § 6 (11), imposes a very slight restriction upon the exercise of the ***limited*** right of free speech conferred under Const 1963, art 1, § 5 to facilitate the Commission's proper and effective performance of its duty to see that its proceedings are undertaken in the open in order to maintain public confidence and ensure that the development of its redistricting plans will not be controlled by partisan political interests. If a Commissioner, staff member, counsel or consultant violates this specific ***constitutional directive***, it may properly be said that he or she has abused the right conferred under Const 1963, art 1, § 5, which does not extend to protect that abuse. The Court of Appeals has properly held that this minor restriction cannot be considered an abrogation. The free speech guarantee will continue as before, and will in no sense be rendered inoperative or a nullity.

4. THE PROPOSED AMENDMENT WOULD NOT ABROGATE ANY PART OF CONST 1963, ART 6, § 13.

Plaintiffs have alleged that the language of the proposed Const 1963, art 4, § 6 (19) conferring original jurisdiction upon this Court for limited review of the Commission's actions would abrogate the language of Const 1963, art 6, § 13 conferring original jurisdiction upon the circuit courts in all matters not prohibited by law.[11] This claim is without merit for the simple reason that Const 1963, art 6, § 13 does ***not*** purport to confer any ***exclusive*** jurisdiction upon the circuit courts as Plaintiffs incorrectly alleged in the proceedings below, and although the proposed amendment would confer original jurisdiction upon this Court to address matters related to redistricting and the Commission's performance of its duties – jurisdiction similar to

[11] Const 1963, art 4, § 6 currently provides: "Upon application of any elector filed not later than 60 days after final publication of the plan, the supreme court, in the exercise of original jurisdiction shall direct the secretary of state or commission to perform their duties, may review any final plan adopted by the commission, and shall remand such plan to the commission for further action if it fails to comply with the requirements of this constitution."

that which the Court already has and routinely exercises with respect to redistricting matters – the proposal contains no language purporting to make that jurisdiction exclusive. Accordingly, there is no basis for a finding that VNP's proposal would abrogate Const 1963, art 6, § 13 if approved by the voters.

Again, it is appropriate to ask: Where is the language creating the irreconcilable inconsistency? And again, the answer is that there is none. Even if VNP's proposal ***did*** purport to make the original jurisdiction conferred upon this Court exclusive, the Court of Appeals has correctly found that the provision of Const 1963, art 6, § 13 conferring original jurisdiction upon the circuit courts allows for exceptions, as it specifically states that their original jurisdiction extends to "all matters not prohibited by law." The Court of Appeals has also correctly noted that the original jurisdiction of the circuit courts may be denied or assigned to another court by constitution or statute.[12] Plaintiffs' argument that an exception can only be provided by statute is soundly refuted by the authorities cited in the Court of Appeals' Opinion, and is not supported by this Court's inapposite decision in *People v Bulger*, 462 Mich 495; 614 NW2d 103 (2000), holding that the language of Const 1963, art 1, § 20 regarding appointment of appellate counsel in criminal cases "as provided by law" required appointment only as provided by statute, and thus, the Court could not require appointment of counsel by court rule pursuant to its rulemaking authority in the absence of legislative action.

The Court of Appeals correctly decided this issue. This Court does not need to review this conclusion.

[12] MCL 600.605 provides that, "Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." Thus, an exception to circuit court jurisdiction authorized by constitutional amendment is also an exception authorized by statute.

IV. EXCLUSION OF THE PROPOSAL AT ISSUE FROM THE BALLOT IS NOT A NECESSARY OR APPROPRIATE REMEDY FOR THE ALLEGED VIOLATIONS OF MCL 168.482(3).

Plaintiffs have asserted that the appropriate remedy for the alleged noncompliance with MCL 168.482(3) is to exclude VNP's proposal from the general election ballot. VNP contends that this remedy is an impermissibly extreme measure in light of the abundant case law discussed below with respect to the constitutionality of § 482(3). This case law has consistently emphasized that the people's reserved right to propose constitutional amendments by initiative should be facilitated rather than restricted. *Ferency,* 409 Mich at 602. Imposition of that remedy would be wholly unwarranted and unreasonable because enforcement of the statutory requirement in this manner would constitute an impermissible curtailment or undue burdening of VNP's right to propose constitutional amendments by voter initiative.

In *Ferency, supra,* this Court ultimately concluded that the sponsor of the proposed amendment had not failed to list any existing constitutional provisions that would be altered or abrogated, and thus, the Court did not consider what the appropriate remedy should have been for the alleged error, if established. In his concurring Opinion, Justice Williams included an enlightening discussion of the difference between the obligation imposed upon a petition sponsor under MCL 168.482, and the publication requirement imposed upon the state election officials by the language of Const 1963, art 12, § 2. Justice Williams agreed that the petition sponsor had properly listed the existing constitutional provisions that would be altered or abrogated to the extent required by MCL 168.482(3), but felt that there were provisions, not identified in the petition, that the Secretary of State should have been required to publish for the electorate in fulfillment of ***the Secretary's constitutional*** duty.

Justice Williams opined that, although the statute used the same terminology, referring to provisions "altered or abrogated," the constitutional publication requirement imposed a more

stringent duty upon the state election officials with respect to the identification of those provisions for the required publication than the duty imposed by statute upon petition circulators, who in many cases are less sophisticated than the agents of the State and have fewer legal resources at their disposal for making that determination. Having noted that difference, he suggested that a deficiency in the petition could be cured by a proper fulfillment of the Secretary of State's duty of publication – a duty which could be aided by a pre-election judicial determination as to which, if any, provisions would be altered or abrogated by the proposed amendment. 409 Mich at 612-624.

Justice Williams' sensible recognition of the difference between the duties imposed upon petition sponsors and the duty required of our state election officials harmonized the constitutional and statutory provisions, consistent with the case law emphasizing that they should be liberally construed and applied to facilitate, rather than obstruct, the free exercise of the people's right to propose constitutional amendments by voter initiative. And consistent with that recognition, Justice Williams' concurrence provided a convincing argument that the Court may properly grant as a remedy an order directing the Secretary of State to publish in the constitutionally required publication any existing provisions that would be abrogated, but were not published by the petition sponsor in their petition. 409 Mich at 637.

Other decisions of this Court have suggested that a failure to identify provisions to be altered or abrogated may be remedied by corrective action directed by judicial decree before the election. *See, Massey v Secretary of State,* 457 Mich 410, 414-415; 579 NW2d 862 (1998) (recognizing the Court's authority to require corrective action by election officials when a challenge is brought before an election); *Carman v Secretary of State,* 384 Mich 443, 454; 185 NW2d 1 (1971) (noting that the purpose of MCL 168.482 was served by the Secretary of State's

proper publication of the existing provision that would be abrogated). In *Carman,* the Court noted, as a matter of "constitutional substance rather than form," that the purpose served by the constitutional requirement is of greater importance than the purpose served by the statutory requirement. 384 Mich at 454-455.

This Court has remedies, other than nullifying the over 390,000 valid signatures that Voters Not Politicians has obtained (as verified by the Bureau of Elections, and now certified by the Board of State Canvassers). This Court should not nullify these voters' desire to have the VNP proposal appear on the ballot.

V. THE STATUTORY REPUBLICATION REQUIREMENT OF MCL 168.482(3) IS UNCONSTITUTIONAL.

Plaintiffs' claim that VNP's proposal must be excluded from the ballot for failure to comply with the republication requirement of MCL 168.482(3) is without merit. But there is another more basic reason to reject Plaintiffs' challenge. If this Court finds a violation of this statute and concludes the violation must be remedied by exclusion of VNP's proposal from the ballot, the constitutionality of MCL 168.482(3) must be considered. VNP contends that the statutory republication requirement of § 482(3) is unconstitutional because the enactment of that requirement is beyond the limited scope of the Legislature's authority to prescribe the form of petitions and regulate their signing and manner of circulation conferred by Const 1963, art 12, § 2.

MCL 168.482, and other provisions of the Michigan Election Law, establish statutory requirements for voter petitions, including petitions proposing initiated laws and amendments of the state Constitution. For the most part, those provisions have served to provide necessary details concerning the form, signing and manner of circulating petitions, which have been addressed by the Legislature in response to the directives of the Constitution. When properly

enacted for implementation of the self-executing constitutional provisions governing voter initiatives, those statutory enactments are constitutional and may be applied in furtherance of that purpose ***if*** their application does not curtail or impose undue burdens upon the free exercise of the people's reserved right to propose laws and constitutional amendments by voter initiative. But a statutory regulation is unconstitutional, and cannot be enforced, if it imposes requirements beyond the scope of the authorization conferred by the constitutional language or its application curtails or unduly burdens the people's free exercise of the reserved right.

A. THE GOVERNING PROVISIONS OF ARTICLE 12, § 2.

Const 1963, art 12, § 2 includes three provisions relevant to the discussion of this issue. The first of these is the language which specifies the required substantive content of petitions proposing amendment of the constitution. That language specifies only one item of required substantive content – the requirement that, "***Every petition shall include the full text of the proposed amendment***." The second confers authority upon the Legislature to prescribe statutory regulations regarding the form of petitions and the manner of their signing and circulation, and states that petitions shall be prepared, signed and circulated in compliance with those regulations: "***Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law***." The third provision relevant to this issue requires the state election officials to publish the proposed amendment and existing provisions of the constitution that would be altered or abrogated thereby, and to include a 100-word statement of the purpose of the proposed amendment on the ballot.

B. THE GUIDING PRINCIPLES

It has always been an important principle of Michigan's jurisprudence that our courts consistently protect the right of ***the people*** to amend the Constitution by initiative petition while enforcing safeguards that ***the people*** have placed on the exercise of that right. Thus, although

the people's right to initiate constitutional amendments must be exercised in accordance with restrictions imposed by the constitutional language, their right to do so cannot be interfered with by the Legislature, the courts, or officers charged with performance of related duties. These time-honored principles were recently reaffirmed by this Court in *Protect Our Jobs*:

> "Within our Constitution, the people have allocated certain portions of their inherent powers to the branches of government. But the people have also reserved certain powers to themselves. Among these powers is the right to amend the Constitution by petition and popular vote. This Court has consistently protected the right of the people to amend their Constitution in this way, while enforcing constitutional and statutory safeguards that the people placed on the exercise of that right. Nearly one century ago we recognized that
>
> > ***"[o]f the right of qualified voters of the State to propose amendments to the Constitution by petition it may be said, generally, that it can be interfered with neither by the legislature, the courts, nor the officers charged with any duty in the premises.*** But the right is to be exercised in a certain way and according to certain conditions, the limitations upon its exercise, like the reservation of the right itself, being found in the Constitution."
>
> 492 Mich at 772, quoting *Scott v Secretary of State,* 202 Mich 629, 643; 168 NW 709 (1918). (Emphasis added)

The expressions and reaffirmation of these principles have been consistent with other judicial pronouncements emphasizing that the constitutional provisions reserving the people's rights of initiative and referendum should be liberally construed to facilitate, rather than restrict, the free exercise of those rights, and that doubts concerning the meaning of implementing legislation should be resolved in favor of the people's exercise of their rights. *Ferency, supra,* 409 Mich at 590-591. The *Ferency* Court emphasized that its decision was consistent with a long line of cases in which Michigan courts have actively protected and enhanced the initiative and referendum power, noting that, "(C)onstitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed" and "their exercise should be facilitated rather than restricted." 409 Mich at 602.

The provisions of Const 1963, art 12, § 2 reserving the right of the people to propose amendments of the state Constitution were derived from Const 1908, art 17, § 2. The decisions of this Court have recognized that each of those provisions was intended to be self-executing. In *Ferency,* which addressed pre-election challenges to the proposed "Tisch tax cut amendment," this Court held that Const 1963, art 12, § 2 is self-executing, and thus, does not depend upon statutory implementation, citing its prior holding in *Hamilton v Secretary of State,* 227 Mich 111, 115, 124-125; 198 NW 843 (1924), that the prior provisions of Const 1908, art 17, § 2, were self-executing, and noting that the analogous provisions governing voter-initiated legislation in Const 1963, art 2, § 9 had also been found to be self-executing in *Wolverine Golf Club v Secretary of State,* 384 Mich 461; 185 NW2d 392 (1971), in spite of that provision's language directing that "the legislature shall implement the provisions of this section." *Id.,* 409 Mich at 591, fn 9.

The *Ferency* Court's holding that Const 1963, art 12, § 2 is self-executing is also consistent with comments found in the constitutional convention record explaining that, although some of the legislation-like detail contained in the 1908 Constitution was being eliminated, enough detail was retained to ensure that the right to propose amendments by initiative would be self-executing, and thus, the right of the people to propose amendments by initiative petition could not be defeated by the Legislature's failure to enact legislation required for implementation of that right. *See,* Constitutional Convention Record, pp. 2459-2460 and 2468-2469, cited by the Supreme Court in *Ferency,* 409 Mich at 591, fn 9.[13]

[13] Copies of the pages of the Constitutional Convention Record cited in *Ferency* are submitted herewith as Appendix "E," with the pertinent discussion highlighted.

Although the Legislature may enact supplementary legislation to facilitate the implementation of a self-executing constitutional right reserved to the people, it may not impose additional requirements that curtail or unduly burden the free exercise of the guaranteed right. This Court emphasized this rule with respect to voter-initiated petitions for amendment of the constitution in *Ferency,* citing its prior consistent holdings in *Wolverine Golf Club v Secretary of State, supra,* and *Hamilton v Secretary of State, supra.* 409 Mich at 589-592. *See also, Soutar v St. Clair County Election Commission*, 334 Mich 258; 54 NW2d 425 (1952).

C. THE STATUTORY REPUBLICATION REQUIREMENT OF MCL 168.482(3) DOES NOT FALL WITHIN THE SCOPE OF THE LEGISLATURE'S CONSTITUTIONAL AUTHORITY TO PRESCRIBE THE FORM OF INITIATIVE PETITIONS FOR AMENDMENT OF THE CONSTITUTION.

Because the requirement to list constitutional provisions that would be altered or abrogated in an initiative petition is purely statutory, if an abrogation is found by this Court, it must determine whether this statute is within the scope of the Legislature's authority to regulate the form of petitions conferred by the language of Const 1963, art 12, § 2, and if so, whether enforcement of that requirement by exclusion of VNP's proposal from the ballot constitutes an impermissible curtailment or burdening of the people's constitutional right to propose constitutional amendments by voter initiative.

This Court's Opinion in *Ferency* assumed that this "new requirement regarding substantive content" was a regulation of "form," and therefore within the scope of the Legislature's constitutional authority to prescribe the form of initiative petitions. 409 Mich at 593. But this Court's Opinion was based upon that assumption, ***arguendo,*** and without analysis or citation of supporting authority. VNP contends that the *Ferency* Court's unexplained

assumption that this requirement was a matter of mere "form" is mere *dicta,*[14] and therefore not binding as authority in this matter under the doctrine of *stare decisis*. It has often been noted that *stare decisis* does not require adherence to prior judicial pronouncements of principles assumed, but not squarely addressed or decided. *See e.g., Brecht v Abrahamson,* 507 US 619, 630-631; 113 S Ct 1710, 1718; 123 L Ed 2d 353 (1993).

VNP contends that the statutory republication requirement does not qualify as regulation of petition "form" authorized by Const 1963, art 12, § 2. Its enactment was, instead, an attempt to establish a requirement of ***substantive content***, as appropriately characterized by the Court's decision in *Ferency.* This is apparent for several reasons.

First, it is highly significant that this requirement, expressed in the same language, was included as a required element of petition content in the 1908 Constitution, as originally adopted.[15] However, this requirement was eliminated by the amendment of Const 1908, art 17, § 2, adopted in 1913. (Appendix "C") It was not included in the amendment of that provision adopted in 1941 (Appendix "D"), or in the general revision of the constitution in 1963.[16] The convention delegates who crafted the current provisions of Const 1963, art 12, § 2 were aware of the prior constitutional provisions. This is persuasive evidence that they, and thus the people, did not intend to impose a requirement that would require proponents of constitutional

[14] The *Ferency* Court may have made this assumption without analysis due to a lack of sufficient time for proper consideration. The Court's Opinion reveals that the application for leave to appeal in that matter was not filed until September 1980. This Court appears to have made the same assumption, without further discussion or analysis, in *Protect Our Jobs,* under similar time constraints.

[15] As originally adopted, Const 1908, art 17, § 2 (Appendix "B") provided, in pertinent part, that "All petitions shall contain the full text of any proposed amendment, together with any existing provisions of the constitution which would be altered or abrogated thereby."

[16] See, Const 1963, art 12, § 2. (Appendix "A")

amendments to identify all existing provisions of the Constitution that would be abrogated by their proposal.

Second, requiring that petition sponsors list any existing provisions of the Constitution that would be altered or abrogated cannot be considered a matter of mere "form," as that term has been commonly understood. The reported decisions have often recognized and addressed the qualitative distinction between matters of form and matters of substance. *See e.g., Ahrenberg Mechanical Contracting, Inc.* 451 Mich 74; 545 NW2d 4 (1996) (addressing approval of a judgment "as to substance and form."); *Karr v Michigan Educational Employees Mutual Insurance Co.,* 228 Mich App 111; 576 NW2d 728 (1998); *Pinkston-Poling v Advia Credit Union,* 227 F Supp 3d 848 (WD Mich 2016) (addressing form and substance of statutory notice.) *See also, Stand up for Democracy v Secretary of State,* 492 Mich 588, 601-602; 822 NW2d 159 (2012) (discussing "form and content requirements" of MCL 168.482.)

The commonly understood difference between form and substance is correctly explained in Black's Law Dictionary (Fifth Ed, 1979):

> "In contradistinction to "substance," "form" means the legal or technical manner or order to be observed in legal instruments or juridical proceedings, or in the construction of legal documents or processes. Antithesis of 'substance.' "

In *Pinkston-Poling, supra,* the court explained the difference, citing the *Black's* definition and another dictionary definition of "form" as "the shape and structure of something as distinguished from the material of which it is composed." 227 F Supp 3d at 852.

A listing of existing provisions that would be altered or amended by a proposed amendment is not a matter of mere shape, structure or format of an initiative petition. As this Court noted in *Ferency,* identification of those provisions ***is an exercise requiring legal analysis by those with sufficient expertise – an exercise which the Court has itself found difficult, and which, in Ferency, yielded widely differing conclusions***. 409 Mich at 595-596.

The list of provisions ultimately determined by that exercise of legal judgment is clearly a matter of substantive content, as opposed to mere form.

Indeed, it appears that this important distinction has been properly recognized by the Board of Canvassers, as evidenced by its preliminary approval of VNP's petition subject to the caveat that its approval did not extend to the question of "[w]hether the petition properly characterizes those provisions of the Constitution that are altered or abrogated by the proposal if adopted." This has also been recognized by the Plaintiffs, as evidenced by their acknowledgement that the Board of State Canvassers is not "empowered to review substantive issues concerning the sufficiency of language included in a petition." (Complaint for Mandamus, ¶ 21)

All of these circumstances point with compelling force to the conclusion that enactment of the republication requirement of MCL 168.482(3) was not within the scope of the authority granted to the Legislature by Const 1963, art 12, § 2, and was therefore an unconstitutional infringement of the people's reserved right to propose amendment of the Constitution. In the Court of Appeals, the Plaintiffs answered this criticism by citing the familiar "presumption of constitutionality," arguing that § 482(3) must be found constitutional because it has been on the books in substantially the same form since 1941. This argument is not persuasive. The presumption of constitutionality cannot save a statute when its unconstitutionality is clearly established, nor can a statute be saved by mere longevity if its original enactment was beyond the Legislature's authority.[17] If this Court should find that one or more of the existing sections

[17] In the Court of Appeals, the Plaintiffs emphasized that the predecessor of § 482 was originally enacted in 1941 by the same legislature that had previously proposed the amendment of Const 1908, art 17, § 2 approved by the voters in the spring of that year. Although this is true, it is not a matter of any significance since the Constitutional amendment adopted by the vote of the ***people*** in 1941 did not confer any authority upon the Legislature to regulate this, or any other

of the Constitution would be abrogated by the VNP proposal, the constitutionality of § 482(3) – an important question of first impression – must be addressed. Plaintiffs should not be allowed to avoid the issue by their suggestion that the Court should continue to apply it without meaningful evaluation of its validity.

Plaintiffs' response in the Court of Appeals also featured an argument that this Court had "forcefully receded from the background principles in *Ferency* that are cited and discussed at length by VNP," citing this Court's decision in *Consumers Power Company v Attorney General*, 426 Mich 1; 392 NW2d 513 (1986) as authority for that proposition. (Plaintiffs' Reply Brief, p. 19) That argument is unsupported because this Court's decision in that case examined the constitutionality of a statutory requirement related to the signing and circulation of petitions – a subject which the Legislature ***has*** been specifically authorized to regulate by the governing terms of Const 1963, art 12, § 2. The republication requirement of § 482(3) is a different, ***substantive***, requirement that cannot be defended as a regulation of the manner of signing or circulation. Plaintiffs have incorrectly characterized it as a regulation of petition ***form***, which is not correct, and if considered by this Court, must be rejected.

matters of substantive petition content. And in any event, the validity of the republication requirement of the present statute must be evaluated in light of the authority conferred by the provisions of our present Constitution.

VI. EXCLUSION OF THE PROPOSAL AT ISSUE FROM THE BALLOT BASED UPON THE ALLEGED VIOLATION OF MCL 168.482(3) WOULD BE UNCONSTITUTIONAL, AS AN IMPERMISSIBLE CURTAILMENT OR BURDENING OF THE PEOPLE'S RESERVED RIGHT TO PROPOSE AMENDMENT OF THE CONSTITUTION BY VOTER INITIATIVE, WHEN ANOTHER SUFFICIENT BUT LESS RESTRICTIVE REMEDY IS AVAILABLE.

Even if it is found that the regulation of substantive content imposed under § 482(3) can properly pass as a legitimate regulation of "form" falling within the scope of the Legislature's authority conferred under Const 1963, art 12, § 2, VNP contends that a strict enforcement of the statute's republication requirement by exclusion of its proposal from the ballot would be unconstitutional, as an undue and unreasonable burden upon VNP's and the people's constitutional right to propose amendment of the Constitution. The imposition of that extreme remedy – the only remedy sought by the Plaintiffs in this action – would be wholly unreasonable and unnecessary, inconsistent with the abuse of discretion standard applicable to the Court of Appeals Opinion and Order in this case, and therefore unconstitutional. Any deficiency in the statutorily required listing identified by this Court's decision in this matter can, and should, be remedied by the proper performance of the State's constitutionally imposed obligation to publish the proposed amendment with the existing provisions that would be altered or abrogated thereby, after certification of the proposal for the ballot.

VNP anticipates that Plaintiffs will criticize its suggestion of this reasonable alternative remedy by claiming that substantial compliance with MCL 168.482(3) cannot suffice, and thus, exclusion of the proposal from the ballot is the only appropriate remedy for any violation of its provisions in light of this Court's decision in *Stand up for Democracy v Secretary of State, supra*. In that case, the Court considered whether a referendum petition filed pursuant to Const 1963, art 2, § 9, should be excluded from the ballot based upon a technical objection that the

heading of the petition had not been printed in 14-point type, as MCL 168.482(2) requires. Although the Court ultimately concluded that the referendum should be certified for the ballot because compliance with the type-size requirement was established, a majority of the Justices also opined that substantial compliance with that requirement could not be considered sufficient in light of the statute's mandatory direction that 14-point type "shall" be used. In support of that pronouncement, those Justices disavowed the doctrine of substantial compliance which had been frequently applied by prior appellate decisions adjudicating challenges based upon alleged failure to comply with statutory petition requirements.

Reliance upon *Stand up for Democracy* as authority for an argument that strict compliance with MCL 168.482(3) should be required in this matter is inappropriate because this Court's decision in that case did not consider whether substantial compliance with statutory requirements can be considered sufficient for certification in cases involving a voter-initiated petition for amendment of the Constitution under Const 1963, art 12, § 2. Thus, the majority's conclusion that strict compliance was required is not binding as authority in this case.[18] The decision in *Stand up for Democracy* addressed a referendum petition filed under Const 1963, art 2, § 9, and the majority concluded that "the doctrine of substantial compliance is inapplicable to referendum petitions submitted for certification." 492 Mich at 594, 608.

The distinction is important because the language of Const 1963 art 2, § 9 (Appendix "F") is substantially different. That provision specifically states that the power of referendum "***must be invoked in the manner prescribed by law***. . " Thus, the majority in *Stand up for*

[18] Indeed, it can be suggested that the majority's finding that strict compliance was required should not be considered binding authority at all because, having found actual compliance with the statutory requirement, the discussion of whether substantial compliance could have sufficed was not necessary to the Court's holding that the requested writ of mandamus should be granted, as noted by the dissenting Justices. 492 Mich at 633-634.

Democracy might have reasonably concluded that the applicable ***constitutional*** language mandated adherence to every aspect of the statutory requirements set forth in MCL 168.482 which, by its terms, mandated compliance with the technical type-size requirement stated therein. But a different evaluation is required here, where the constitutional language governing initiative petitions to amend the Constitution merely allows the Legislature to prescribe the "form" of petitions, and has not declared that the right to seek amendment of the Constitution by initiative petition "must be invoked in the manner prescribed by law."

Because *Stand up for Democracy* did not address the application of statutory requirements in relation to a voter-initiated petition to amend the Constitution, the Court's Opinion did not consider whether the strict compliance rule would impose an unconstitutional burden upon the free exercise of a petition sponsor's constitutionally guaranteed right to seek amendment of the Constitution by voter-initiated petition. This constitutional question is important, and should therefore be addressed in this case if a statutory violation is found. It will be essential to do so in that event because it is clear, in light of the authorities previously discussed, that blind adherence to a requirement of strict compliance would be inappropriate where, as here, the statute in question imposes requirements in addition to those required by a self-executing constitutional provision, and enforcement of those requirements would curtail or impose an undue burden upon the free exercise of the constitutionally guaranteed right. Even if the statutory republication requirement is considered a regulation of "form" authorized by Const 1963, art 12, § 2, strict enforcement of that requirement by exclusion of VNP's proposal from the ballot when another less intrusive remedy would suffice would be an unconstitutional curtailment or undue burdening of VNP's constitutional right to propose constitutional amendments by voter initiative.

VNP respectfully suggests, therefore, that in the event that this Court finds that the VNP proposal violates §482(3), it should re-examine the requirement of strict compliance endorsed by the majority in *Stand up for Democracy,* and that upon reconsideration, the Court should restore the time-honored doctrine of substantial compliance or limit the strict compliance requirement of *Stand up for Democracy* to cases involving referendum petitions filed pursuant to the dissimilar provisions of Const 1963, art 2, § 9.

Application of the doctrine of substantial compliance in cases of proposed constitutional amendments would serve two laudable purposes. It would safeguard the free exercise of the people's reserved right to propose amendment of the Constitution by voter initiative while also ameliorating the potential for unfair prejudice resulting from strict enforcement of statutory technicalities. The potential for unfair application of MCL 168.482(3) is illustrated by what has occurred in relation to the proposal at issue in this case. When VNP submitted its petition for "as to form" approval to the Board of Canvassers, it proposed republishing five sections of the Constitution which it believed would be abrogated. As the Court of Appeals has noted, the Elections Bureau staff refused to recommend approval because they believed that the VNP Proposal did not abrogate any existing section of the Constitution. It was not until VNP altered those five sections, adding the prefatory language "EXCEPT TO THE EXTENT LIMITED OR ABROGATED BY…" (thus altering them, and not republishing them as being abrogated) that the Bureau staff would agree to recommend approval of the form of VNP's petition.[19]

From this, it may be seen that the Elections Bureau, the state agency responsible for interpreting the Michigan Election Law, believed that the VNP petition, as initially submitted,

[19] *See*, e-mail correspondence and memoranda submitted herewith as Appendices "G," "H" and "I."

did not abrogate any existing sections of the Constitution. VNP, believing that its proposal would abrogate five sections of the Constitution, amended its petition accordingly to avoid the Elections Bureau's objections. Now, Plaintiffs allege that there are four additional sections of the Constitution that are abrogated.[20] This kind of uncertainty as to whether an existing section of the Constitution would be abrogated by a proposed amendment is precisely the sort of situation that this Court has said it wished to avoid in *Ferency* and *Protect Our Jobs*. It seems certain that if this legitimate concern is not heeded, every future sponsor of an initiative petition to amend the Constitution will, out of an abundance of caution, propose adding to any section of the Constitution that it might conceivably affect, a provision stating: "EXCEPT TO THE EXTENT LIMITED OR ABROGATED BY..." simply to avoid a potential abrogation challenge.

VII. THE BALLOT PROPOSAL AT ISSUE HAS BEEN PROPERLY PRESENTED AS A VOTER-INITIATED PROPOSAL FOR AMENDMENT OF THE CONSTITUTION PURSUANT TO CONST 1963, ART 12, § 2, AND THUS, CONSIDERATION OF VNP'S PROPOSAL NEED NOT BE RESERVED UNTIL THE NEXT CONSTITUTIONAL CONVENTION.

Plaintiffs have asserted that VNP's proposal to amend the Constitution cannot be approved for submission to the voters because it impermissibly addresses multiple purposes, and have also argued that the proposed changes would constitute a general revision of the Constitution which can only be accomplished by means of a constitutional convention convened

[20] It is noteworthy that Plaintiffs did not raise their claims of potential abrogation until the filing of their Complaint for Mandamus in the Court of Appeals on April 25, 2018. Plaintiffs knew the content of VNP's petition when the Board of State Canvassers granted its preliminary approval in August of 2017, and knew, or should have known, that VNP had filed its petition with more than 425,000 supporting signatures on December 18, 2017. If the potential abrogation was as clear as Plaintiffs have now claimed, it is a fair question to ask why it took them so long to raise their objection.

pursuant to prior approval of the voters under Const 1963, art 12, § 3. The Court of Appeals has properly found these claims meritless.

A. THE CONSTITUTIONAL PROCEDURE TO AMEND THE CONSTITUTION BY VOTER INITIATIVE DOES NOT IMPOSE ANY RESTRICTION UPON THE COMPLEXITY, SUBJECT MATTER OR SCOPE OF A PROPOSED AMENDMENT.

The language of Const 1963, art 12, § 2 does not impose or suggest any limitation upon the permissible subject matter or scope of a proposed constitutional amendment presented by voter initiative petition pursuant to that section, nor is any such limitation imposed or suggested by the language of Const 1963, art 12, § 3, addressing the calling of a constitutional convention.[21] The only relevant limitations which have been imposed by this Court have been its pronouncements that an amendment may alter multiple sections as long as the changes are germane to a single overall subject or purpose, and the practical limitation imposed by the constitutional requirement to summarize the proposed amendment in no more than 100 words.

VNP contends that it would be inappropriate for the Court to read limitations of subject matter or scope into either provision. The few reported decisions challenging the scope of voter-initiated constitutional amendments are consistent with the principle that limitations may not be read into the constitutional language. In *City of Jackson v Commissioner of Revenue,* 316 Mich 694; 26 NW2d 569 (1947), decided under the similar provisions of the 1908 Constitution, this Court considered a claim that the constitutional amendment at issue was the product of an improper attempt to initiate legislation "under the guise of an amendment to the constitution." In rejecting that argument, the Court emphasized that the Constitution did not include any language limiting the scope of a proposed constitutional amendment with respect to matters which could also be addressed by legislation, and noted that any line of demarcation between

[21] Copies of Const 1963, art 12, §§ 2 and 3 are submitted herewith as Appendices "A" and "J."

legislation and constitutional amendment was "too indefinite to require that an arbitrary decision be made in advance of submitting the question to the voters." 316 Mich at 709-710.

In *Graham v Miller,* 348 Mich 684; 84 NW2d 46 (1957), also governed by the similar provisions of the 1908 Constitution, the Court rejected a challenge to a constitutional amendment which argued that the amendment was invalid because it covered more than one purpose, and was therefore improperly submitted to the electors as a single question on the ballot. In so ruling, the Court noted that one of the cases cited in support of the challenge was based upon provisions of the Home Rule Act, which specifically limited proposed amendments to one subject, but emphasized that there was "no comparable provision in the Michigan Constitution limiting the subject matter of a constitutional amendment or prohibiting the inclusion in one amendment of proposals for more than one purpose." 348 Mich at 691-692.

The decisions have also recognized the related principle that a proposed amendment may include alterations of multiple sections when the changes are germane to the accomplishment of a single overall purpose. Having found no constitutional basis for the challenge raised in *Graham*, the Court went on to conclude that the objection was without merit in any event, because the amendment in question was adopted in furtherance of a single purpose, and its provisions were germane to the accomplishment of that overall purpose. 348 Mich at 692-693.

In *Kelly v Laing,* 259 Mich 212; 242 NW2d 891 (1932), the Court found that a multifarious collection of proposed amendments to the Bay City Charter proposing substantial changes in several unrelated aspects of the City government was not in a proper form for submission to the voters where the petition at issue proposed a separate vote on each of the 13 sections involved, but explained that a proposed "amendment" may modify multiple sections if

all of the proposed changes are germane to the purpose of the amendment, and that all proposals pertaining to the same subject and directed to the same purpose should be treated as one amendment and voted on as such, although they contemplate changes to more than one section. 259 Mich at 215-216. *See also, People v Stimer,* 248 Mich 272, 287; 226 NW 899 (1929) ("The word "amendment" is clearly susceptible to a construction which would make it cover several propositions, all tending to effect and carry out one general object or purpose, and all connected with one subject.")

The holdings of these decisions continue to apply with equal force today because there has been no change in the substance of the pertinent constitutional language with respect to this issue. The governing language of Const 1963, art 12, § 2 does not impose or suggest any limitation upon the permissible subject matter or scope of a proposed constitutional amendment presented by voter initiative petition pursuant to that section, nor is any such limitation imposed by any other constitutional provision.[22] VNP contends that it would be improper to read any such limitations into the clear language of our Constitution by judicial interpretation.

B. ARTICLE 12, § 3 DOES NOT LIMIT THE PERMISSIBLE SUBJECT MATTER OR SCOPE OF A CONSTITUTIONAL AMENDMENT PROPOSED UNDER ARTICLE 12, § 2.

There is also no basis in the constitutional language for the Plaintiffs' suggestion that the scope of constitutional amendments proposed under Const 1963, art 12, § 2 is limited by the provisions of Const 1963, art 12, § 3, addressing the calling of a constitutional convention for a "general revision" of the Constitution.

[22] For comparison, VNP would direct the Court's attention to Article 2, § 8(d) of California's Constitution, which provides that, "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect."

1. THE SIGNIFICANT DIFFERENCES IN PURPOSE AND TERMINOLOGY.

There are a number of points that the Court should consider when evaluating this issue. First, it is important to recognize the essential differences between the purpose and operation of the separate procedures for amendment of the Constitution provided under Const 1963, art 12, §§ 2 and 3. Const 1963, art 12, § 2 reserves the right of the people to amend the Constitution by voter initiative. Const 1963, art 12, § 3 provides the people with an alternative means for amendment of the Constitution by allowing them an opportunity to convene a constitutional convention for a "general revision" of the Constitution. There are significant differences between these alternatives. The right of the people to propose amendments of the Constitution *directly* by voter initiative under Const 1963, art 12, § 2 may be invoked at any time a need is perceived. Their opportunity to convene a *convention* to consider a general revision of the Constitution under Const 1963, art 12, § 3 comes once every 16 years.

To properly understand the differences, it is also important to note and properly apply the different definitions of "amendment" and "revision." This requires an awareness that there is more than one commonly understood definition of "amendment" ***and*** "revision," and thus, there are commonly understood differences between the general concepts of "amendment" and "revision" which depend upon the context in which the terms are used. Although "amendment" can refer to a process of amending, its use in each of these constitutional provisions refers to a proposed or accomplished alteration or addition to the existing constitutional language.[23]

[23] The Merriam Webster's Collegiate Dictionary, Tenth Ed. (1996), defines "amendment" as "the process of amending by parliamentary or constitutional procedure" and "an alteration proposed or effected by this process."

A reference to "revision" has two accepted meanings as well; depending upon the context, it may refer to a document which has been revised, or to a process of revision.[24] The language of Const 1963, art 12, § 3 embraces the second of those meanings – the process of revision. It establishes a mandatory procedure for securing a vote of the electorate as to whether a constitutional convention should be convened to implement the process of revision – a procedure which operates automatically by virtue of the constitutional mandate to present the question to the voters every 16 years. If the electorate votes in favor, a convention will be convened, with delegates subsequently chosen by election. It is then up to the convention, through the deliberation and votes of its elected delegates, to create a new Constitution or amend the old one.

The character of Const 1963, art 12, § 3 as an establishment of an alternative ***procedure*** is illustrated by the fact that, although a constitutional convention convened for "general revision" of the existing Constitution will usually draft a new one, it is not required to produce a new Constitution or even a substantial revision of the old one. The language of Const 1963, art 12, § 3, and explanations offered in the constitutional convention debates confirm the intent of the drafters, and thus the people, that a revision authorized pursuant to that provision could effect a wholesale rewrite producing an entirely new Constitution, or be limited to one or more amendments of the existing Constitution.[25]

[24] The Merriam Webster's Collegiate Dictionary, Tenth Ed. (1996), defines "revision" as "an act of revising" and "a result of revising."

[25] During the discussion of the proposed Article 12, § 3 on the Order of Second Reading, Subcommittee Chair Habermehl explained that, once convened pursuant to the vote of the people, a convention would be free to change as much or as little as it chooses, and could therefore elect to propose only one, or a few amendments, while leaving the basic document unchanged. (Constitutional Convention Record, p. 3007, submitted herewith as Appendix "K")

There is a stark contrast between the procedure for convening a constitutional convention outlined in Const 1963, art 12, § 3 and the much simpler and very different procedure for voter-initiated amendment of the Constitution set forth in Const 1963, art 12, § 2. The provisions of Const 1963, art 12, § 3 provide a means to initiate a ***process of general revision*** – a process which may produce any number of suggestions for changes which will then be subject to refinement, debate, deliberation, and ultimately, approval by the people. The proposal of an amendment under Const 1963, art 12, § 2 does not initiate a "***process of amending***" in any similar sense. It offers a specific alteration and/or addition to the Constitution proposed by a sponsoring individual or entity, set forth in the required petition and later on the ballot, which must be approved or disapproved by an up or down vote of the electorate.

The language of Const 1963, art 12, § 3 providing its alternative process for amendment contains no content suggesting an intent to limit the subject matter or scope of amendments proposed under Const 1963, art 12, § 2. The Court should note, by comparison, that substantive limitations ***have*** been placed upon the permissible scope of initiated laws proposed by voter initiative under Const 1963, art 2, § 9 (Appendix "F") by its language specifying that, "[t]he power of initiative extends only to laws which the legislature may enact under this constitution." By virtue of that limitation, the right of the people to propose laws by initiative is subject to all of the limitations of the legislative power set forth in Article 4. Those limitations include: 1) the limitation of Const 1963, art 4, § 24, that, "[n]o law shall embrace more than one object, which shall be expressed in its title"; 2) the limitation of Const 1963, art 4, § 25, that, "[n]o law shall be revised, altered or amended by reference to its title only"; and 3) the limitation of Const 1963, art 4, § 36, that, "[n]o general revision of the law shall be made."

The last of those limitations makes it clear that the people's right to propose legislation under Const 1963, art 2, § 9 does not extend so far as to permit a general revision of the statutory law by voter initiative. No such limitation is found in the language of Const 1963, art 12, § 2. The drafters of the 1963 Constitution knew how to limit the scope of the reserved right of initiative, as evidenced by the limitation of that right built into Const 1963, art 2, § 9. The absence of any such limitation in Const 1963, art 12, § 2 should be seen as a clear indication that no such restriction was intended.

2. THE COURT SHOULD DECLINE TO ADOPT THE TEST APPLIED IN *CITIZEN PROTECTING MICHIGAN'S CONSTITUTION v SECRETARY OF STATE*, 280 MICH APP 273; 761 NW2d 210 (2008) OR LIMIT ITS APPLICATION TO THE HIGHLY UNUSUAL FACTS OF THAT CASE.

Plaintiffs' argument that the proposed changes would amount to a general revision of the Constitution has been based primarily upon the Court of Appeals' decision in *Citizens Protecting Michigan's Constitution v Secretary of State,* 280 Mich App 273; 761 NW2d 210 (2008), *result affirmed,* 482 Mich 960; 755 NW2d 157 (2008), which held that the staggeringly diverse and voluminous Reform Michigan Government Now! ("RMGN") proposal could not be included on the ballot as a voter-initiated proposal because it would have amounted to a general revision of the Constitution.[26] In finding an impermissible attempt at revision in that case, the Court opined that, for purposes of Const 1963, art 12, §§ 2 and 3, there is a legally significant distinction between a revision and an amendment which depends upon both the

[26] The RMGN proposal was much broader in scope than the proposal now at issue. Unlike VNP's proposal, which addresses the single subject and purpose of redistricting reform, the RMGN proposal addressed several distinct and unrelated subjects, proposing modification of 24 existing sections and the addition of 4 new sections in 4 different articles of the Constitution. To illustrate the extraordinary breadth of the proposal and the diversity of the RMGN proposal's subject matter, the Court's Opinion in *Citizens Protecting Michigan's Constitution* included a non-exhaustive list of 29 proposed changes, too extensive for reproduction here. 280 Mich App at 279-281, 305.

quantitative and the qualitative nature of the proposed changes. The Court explained that, in evaluating those criteria, "the determination depends on, not only the number of proposed changes or whether a wholly new constitution is being offered, but on the scope of the proposed changes and the degree to which those changes would interfere with, or modify, the operation of government." 280 Mich App 304-305. The Court was careful to emphasize, however, that its decision was ***not*** intended "to prevent the citizens from voting on a proposal simply because that proposal is allegedly too complex or confusing." *Id.* at 276.[27]

For the reasons previously discussed, VNP contends that there is no proper basis for recognition of a legally significant distinction between an amendment and a revision of the Constitution in the application of Const 1963, art 12, § 2, and that the Court should therefore decline to adopt the arbitrary and unreliable qualitative/quantitative test employed in *Citizens Protecting Michigan's Constitution* to define the permissible scope of a proposed constitutional amendment, or alternatively, that the use of that test – borrowed primarily from decisions of other states and injected into our own constitutional provisions by interpretation – should be limited to the facts of that highly unusual case involving a blatantly multifarious proposal.[28]

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[27] Upon further review of the RMGN proposal, this Court affirmed the result reached by the Court of Appeals without endorsing the legal rationale for its holding, based upon its own sensible determination that it would have been impossible to summarize the purpose of the RMGN proposal in 100 words, as Const 1963, art 12, § 2 requires. *Citizens Protecting Michigan's Constitution v Secretary of State,* 482 Mich 960-964; 755 NW2d 157 (2008).

[28] The Court of Appeals' Opinion in *Citizens Protecting Michigan's Constitution* suggests that the rationale for its adoption of the qualitative/quantitative standard was flawed by a failure to recognize that, as used in Const 1963, art 12, § 2, the term "amendment" does not contemplate a "process of amending," as the Court appears to have assumed. 280 Mich App at 295. By equating an "amendment" proposed or adopted pursuant to Const 1963, art 12, § 2 with a ***process*** similar to the process of "general revision" initiated under Const 1963, art 12, § 3, the Court of Appeals improperly injected the concept of "revision" into its interpretation of Const 1963, art 12, § 2, where it has no proper application.

VNP respectfully suggests that this would be the sensible course, and especially so, in light of this Court's unwillingness to endorse the legal rationale for that decision.

C. VNP'S PROPOSED CONSTITUTIONAL AMENDMENT IS NOT A GENERAL REVISION OF THE CONSTITUTION AS DEFINED BY THE COURT OF APPEALS' DECISION IN *CITIZENS PROTECTING MICHIGAN'S CONSTITUTION v SECRETARY OF STATE.*

Even if it is assumed, *arguendo,* that the test employed in *Citizens Protecting Michigan's Constitution* could be considered an appropriate measure of the difference between an amendment and a "general revision," application of that test cannot justify exclusion of VNP's proposal from the November 2018 General Election ballot. VNP's proposal cannot be legitimately called an attempted "general revision" by application of that standard or any other.

The proposal at issue in *Citizens Protecting Michigan's Constitution* was far more extensive and complex than VNP's proposed amendment, and it was a simple matter for the Court to conclude that the proposal was indeed multifarious, as it addressed a broad variety of unrelated subjects. VNP's proposal is dramatically different because all of its provisions ***have*** been conceived and designed to accomplish a single overall purpose – to remedy the widely-

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The distinction between "revision" and "amendment" of the Constitution made in *Citizens Protecting Michigan's Constitution* is also unsatisfactory because the nebulous comparison of the qualitative and quantitative nature of changes proposed by that decision provides no clear standards capable of delivering consistent results. Thus, applying that standard in any but the most extreme cases – like the RMGN proposal considered in that case – can be expected to yield widely differing conclusions, and this level of uncertainty cannot be tolerated when suspension of the people's right to propose constitutional amendments by voter initiative is proposed. Plaintiffs have complained that VNP's proposal amends too many sections and contains too many words. How many are too many? The constitutional language provides no answer. Plaintiffs have also argued that an amendment must be limited to a "mere correction of detail" but they overlook the prior decisions of this Court holding that an amendment may properly include several sections if all of the proposed changes are germane to a single overall purpose, and they seem to have forgotten that several voter-initiated constitutional amendments have brought about extensive and important changes. These have included the Headlee Amendment, the Proposal A Property Tax Amendment, the Crime Victims Rights Amendment and the Natural Resources Trust Fund Amendment, to name a few.

perceived abuses associated with partisan "gerrymandering" of state legislative and congressional election districts by the establishment of a new politically-balanced Independent Citizens Commission having sole and exclusive authority to develop and establish redistricting plans. All of the proposed changes, which affect only three of the Constitution's twelve articles, are germane to the accomplishment of that single purpose.

The proposed amendments to the Legislative Article would establish the new Citizens Commission as a permanent Commission in the legislative branch, replacing the existing constitutional provisions regarding apportionment of the state Senate and House of Representatives districts.[29] Those proposed additions would provide for the establishment and funding of the Commission and define and facilitate the performance of its duties. They would also provide for selection of the Commission's politically-diverse members by use of a methodology designed to ensure that the redistricting process could no longer be controlled by one political party; define the role of the Secretary of State in the selection of the Commission's members; prescribe the performance of the Commission's duties, including the criteria to be

[29] It is important to note, in this regard, that the new provisions proposed by VNP's ballot proposal are similar to the existing provisions Const 1963, art 4, § 6 insofar as they provide for apportionment of the state Senate and House of Representatives districts by a politically-balanced Commission. As the Court of Appeals has discussed, the constitutionally prescribed Commission on Legislative Apportionment has not been utilized for apportionment of Michigan's Senate and House of Representatives districts since 1972, because this Court's decision in *In re Apportionment of State Legislature*, 413 Mich 96; 321 NW2d 565 (1982) held that the constitutionally prescribed use of weighted land area/population formulae violated the Equal Protection Clause of the U.S. Constitution, and that the invalid provisions were not severable. More recently, the Legislature has had the responsibility for performing the periodic reapportionment of election districts for the Michigan Senate and House of Representatives, subject to review and independent action by the Supreme Court, pursuant to 1996 PA 436, MCL 4.261 *et seq.*, as amended. The reapportionment of Michigan's congressional election districts has been performed in similar fashion pursuant to the provisions of 1999 PA 221, MCL 3.61, *et seq.* and 1992 PA 222, MCL 3.71, *et seq.*

considered and applied in its development of the redistricting plans; and prescribe the procedures for the adoption and implementation of those plans.

As amended by VNP's proposal, Const 1963, art 4, § 6 would include provisions designed to ensure the independence of the new Commission, declaring that the powers granted to the Commission would be considered legislative functions, exclusively reserved to the Commission, but not subject to the control or approval of the Legislature. Thus, although VNP's proposal would shift the Legislature's present authority to perform the redistricting function to an independent Commission similar to the Commission prescribed by the existing language of Const 1963, art 4, § 6, and prohibit any legislative interference with the Commission's performance of that function, it would not suspend or erode any other part of the legislative power conferred under Article 4.

As amended by VNP's proposal, Const 1963, art 4, § 6 would also allow limited review by this Court. The new subsection 6 (19) addressing that issue is also quite similar to the existing provisions of Const 1963, art 4, § 6 and the subsequently enacted legislation. The Court's role and authority with respect to the redistricting process would be the same as its current role and authority under the existing language of Const 1963, art 4, § 6, MCL 1996 PA 463 and 1999 PA 222, except that it would not be allowed the authority to order the adoption of its own preferred redistricting plan, as currently provided in Const 1963, art 4, § 6, and presently allowed by MCL 3.74 and MCL 4.264.

VNP's proposal would effect minor amendments to three sections of the Executive Article to ensure the continuity and independence of the Commission. The changes would add new language, similar to the language included in the proposed Const 1963, art 4, § 6, declaring that the powers granted to the Commission would be considered legislative functions,

exclusively reserved to the Commission and not subject to the control or approval of the Governor. The proposal would also amend Const 1963, art 5, § 4, addressing the establishment of temporary commissions or agencies, to recognize the proposed establishment of the Independent Citizens Redistricting Commission as a permanent Commission. No other modification or erosion of the executive power has been proposed.

VNP's proposal would amend the Judicial Article to impose a narrow limitation of the Supreme Court's authority to exercise superintending control; to issue, hear and determine prerogative and remedial writs; and to exercise appellate jurisdiction by the addition of new language specifying that the Court may exercise that authority except to the extent that its authority is limited or abrogated by Const 1963, art 4, § 6 or Const 1963, art 5, § 2. Thus, this Court would be empowered to adjudicate redistricting disputes as it has in the past, but would no longer be empowered to "promulgate and adopt a redistricting plan or plans for this state." No other limitation of this Court's jurisdiction or authority has been proposed.

VNP's proposal has been drafted and presented to serve a single narrow purpose – to remedy the abuses associated with partisan gerrymandering of state legislative and Congressional districts. It does not propose any broad-reaching fundamental change in the form or function of our state government, as Plaintiffs have suggested,[30] and there is no basis whatsoever for a finding that the changes proposed for the accomplishment of VNP's single

[30] In the Court of Appeals, Plaintiffs quoted this Court's decision in *In re Apportionment of State Legislature*, 413 Mich 96; 321 NW2d 565 (1982) out of context to suggest that any change in the means by which members of the Legislature are chosen is a "fundamental matter" which must therefore be regarded as a revision. The quoted statement offered in support of that suggestion was made in reference to the Court's conclusion that the existing constitutional provisions for redistricting by the Commission on Legislative Apportionment could not be utilized and that the invalid provisions were not severable because it could not be assumed that the people would have voted to approve use of the constitutional redistricting process without them.

narrow purpose are so extensive or disruptive as to qualify as a "general revision" of the Constitution. All of the proposed changes are germane to the accomplishment of the proposal's single purpose, and thus, there is no basis for a finding that they cannot be properly proposed as an amendment of the Constitution pursuant to Const 1963, art 12, § 2.

It may be acknowledged that VNP's proposal would supersede the existing constitutional and statutory provisions governing redistricting of state legislative and congressional districts, and that the Plaintiffs do not favor the substance of the proposed changes, but this does not provide any legitimate support for Plaintiffs' claim that the proposed changes can only be effected by a constitutional convention. Nor is there any legitimate basis for Plaintiffs' speculation that VNP's proposal cannot be summarized in 100-words. The constitutionally-required 100-word summary is a summary of the purpose of the proposed amendment.[31] The decisions addressing that requirement have recognized that it does not require an itemization of detail in light of the 100-word limitation.[32] *See*, *Massey v Secretary of State,* 457 Mich 410, 414-415; 579 NW2d 862 (1998); *City of Jackson v Commissioner of Revenue,* 316 Mich 694, 709; 26 NW2d 569 (1947); *Citizens for Protection of Marriage v Board of State Canvassers.* 263 Mich App 487, 494; 688 NW2d 538 (2004). As the Court of

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[31] Const 1963, art 12, § 2 requires that a ballot containing a proposal for amendment of the Constitution contain "shall contain a statement of the purpose of the proposed amendment, expressed in not more than 100 words" which "shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment." The same requirement expressed in the same language has been set forth in MCL 168.32(2), which provides that the 100-word summary shall be prepared by the Director of Elections with the approval of the Board of Canvassers.

[32] The requirement that the ballot include a 100-word summary of a proposed constitutional amendment was added to Const 1908, art 17, § 2 by the amendment adopted in 1941 (Appendix "D") and was subsequently incorporated into Const 1963, art 12, § 2. During the constitutional convention of 1962, Delegate Durst explained the purpose of the requirement, noting that a 100-word summary was necessary for use on voting machines, the use of which had become widespread. (Constitutional Convention Record, p. 2467, submitted herewith as Appendix "L")

Appeals has correctly noted, Plaintiffs' speculation that VNP's proposal cannot be summarized in 100 words is premature, and is not ripe for judicial evaluation for two reasons. First, the Director of Elections has not yet prepared the 100-word summary for this proposal or expressed any inability to do so. Second, bearing in mind that it is a summary of the *purpose* of the proposed amendment that is required, and that this does not require a specification of detail, it does not appear, as it did with respect to the RMGN proposal, that there is likely to be any difficulty in crafting the 100-word summary of purpose.[33]

RELIEF

WHEREFORE, the Intervening Defendants / Cross-Plaintiffs – Appellees respectfully request that Plaintiffs – Appellants' Application for Leave to Appeal be denied.

Respectfully submitted,

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[33] To illustrate the fact that the predicted impossibility is imagined, examples of 100-word summaries that could be used for this proposal are submitted herewith as Appendix "M."